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No. 85-1690

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

GOODYEAR FARMS, *et al.*,
Appellants,

v.

THE CITY OF AVONDALE,
Appellee.

On Appeal from the Supreme Court of the State of Arizona

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the State of Arizona's annexation statute, which permits the owners of half of the value of the property to be annexed to initiate the annexation process by petition, violates the Equal Protection Clause of the Fourteenth Amendment because non-owners of property are excluded from the petitioning process.

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Appellee, the City of Avondale, respectfully moves this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Arizona on the ground that the federal question upon which the appeal to this Court depends is so unsubstantial as not to need further argument. Sup. Ct. R. 16.1.

OPINIONS BELOW

The opinion of the Supreme Court of Arizona (J.S. App. A1-A18) is reported at 714 P.2d 386. The opinion of the Court of Appeals of Arizona (J.S. App. B1-B9) is not reported.

JURISDICTION

The judgment of the Supreme Court of Arizona was entered on January 13, 1986. Notice of appeal was filed on March 21, 1986, and the jurisdictional statement was filed on April 14, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2).

STATEMENT

1. In Arizona, a city or town is permitted to annex property pursuant to the procedure set out in Ariz. Rev. Stat. § 9-471 (hereafter "§ 9-471"). Under that statute, annexation can be initiated only

> [o]n presentation of a petition in writing signed by the owners of not less than one-half in value of the real and personal property as would be subject to taxation by the city or town in the event of annexation, in any territory contiguous to the city or town. . . .

Ariz. Rev. Stat. 9-471(A)(1). Once a satisfactory petition is presented to the annexing city or town, "the governing body of the city or town" can then enact an ordinance effecting the annexation.

In 1981, a petition was circulated among the property owners in an area adjacent to the City of Avondale. J.S. App. A3. Property owners representing more than one-half of the taxable real and personal property in the affected area signed the petition and it was presented to the City as a request for annexation. *Ibid.* On May 26, 1981, an ordinance was passed annexing the property to the City. *Ibid.*

2. Appellants are property owners in the area of the proposed annexation. After the City adopted its ordinance annexing the area, appellants filed the instant lawsuit against the City in the Superior Court of Maricopa County, challenging the constitutionality of the annexation procedure embodied in § 9-471. They alleged

specifically that the exclusion of non-property owners from the petitioning process violated the Equal Protection Clause of the Fourteenth Amendment. The trial court granted the City's motion for summary judgment. J.S. App. B2.[1]

The court of appeals reversed. J.S. App. B1-B9. The court expressly declined to decide whether the petitioning process could be compared to voting for purposes of deciding what standard of judicial review to apply to the annexation statute. *Id.* at B4-B5. Instead, the court held that, even under a "rational relationship" standard, the statute was unconstitutional. The court reasoned that all residents have a substantial interest in annexation and that there was "no significant or substantial difference between the class of non-property owners and the class of real and personal property owners to constitutionally justify the exclusion of the former from the petitioning process." *Id.* at B8.

The Arizona Supreme Court reversed. J.S. App. A1-A18. It held that there is no constitutional right to vote in an annexation proceeding and that Arizona in its statute clearly does not equate petitioning with voting. *Id.* at A6-A10. The court rejected appellants' claim that petitioning is analogous to voting for purposes of an equal protection analysis. Accordingly, the court held that the "rational relationship" test of judicial review was appropriate in this case. *Id.* at A11-A12. The Arizona Supreme Court upheld § 9-471 because the greater

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[1] Subsequent to the entry of judgment by the Arizona Supreme Court, the Arizona Legislature enacted House Bill 2189, which amends § 9-471. Under the new law, annexation can be initiated only upon "a petition in writing signed by the owners of one-half or more in value of the real and personal property and more than one-half of the persons owning real and personal property that would be subject to taxation by the city or town in the event of annexation. . . ." Ariz. Rev. Stat. § 9-471 (1986 Amend.) The new Act thus does not alter the annexation process in any way that would affect the proper resolution of this case. Both laws rely upon property owners to initiate the annexation process.

voice afforded to property owners in the annexation process rationally protected their greater interest in being subject to the annexing city's property taxes and bond liens after annexation. J.S. App. A12. In addition, the court held that inclusion of all electors would complicate the annexation process and thereby "hinder the orderly growth of Arizona cities and towns." *Ibid.*[2]

ARGUMENT

The decision of the Arizona Supreme Court rejecting appellants' claim that § 9-471 should be reviewed judicially under the "compelling state interest" standard of the Equal Protection Clause and finding a rational basis for the legislative classification embodied in Arizona's annexation procedure is directly supported by decisions of this Court, particularly *Adams* v. *City of Colorado Springs*, 399 U.S. 901 (1970), *aff'g*, 308 F. Supp. 1397 (D. Colo.). Moreover, the decision below conflicts with no decision of any other court and involves a statutory procedure that appears to be unique. Under these circumstances, there is no substantial federal question presented which warrants plenary review by this Court.

1. Appellants ask (J.S. 3-4) this Court to hold that residents of a territory subject to potential annexation should have a constitutional right to vote in any annexation proceeding. They base this claim solely on the ground that annexation is important to all residents of the annexed area, and therefore, all should have a say in whether annexation is permitted.[3]

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[2] The court did not consider whether appellants, who own property and therefore are not in the class arguably disadvantaged by the exclusion of non-property owners, lacked "standing" to challenge the annexation statute. The court held that "standing" was not required to prosecute a state court lawsuit. J.S. App. A3 n.1.

[3] This argument would be more persuasive if it were being presented to a state legislature and not to this Court. Most states do

This Court long ago made clear, however, that, even though annexation decisions may cause residents to "suffer inconvenience, and their property may be lessened by the burden of increased taxation, or for any other reason, . . . there is nothing in the Federal Constitution which protects them from these injurious consequences." *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 179 (1907). Indeed, the Court has routinely rejected arguments in other contexts to employ strict scrutiny under the Equal Protection Clause based on claims that the subject matter being regulated was particularly important to the individual. See *e.g.*, *Dandridge* v. *Williams*, 397 U.S. 471 (1970) (welfare); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973) (education).

Relying upon *Hunter*, a three-judge district court in *Adams* v. *City of Colorado Springs*, 308 F. Supp. 1397, 1403 (D. Colo. 1970) (emphasis in original), held unequivocally that "there is no absolute constitutional right under the *due process* clause of the Fourteenth Amendment to vote on a proposed annexation." In *Adams*, residents in an annexed area challenged a state law which permitted the annexing City to annex their territory without obtaining any prior approval because of the extent of the territory's contiguity to the City, but permitted residents in other areas which had less contiguity to vote or petition before annexation could be approved by the City. The district court concluded that this classification, which, if anything, is more insensitive to voting rights than the Arizona statute, should be reviewed under a rational relationship test and held that the state law was clearly constitutional. 308 F. Supp. at 1402-1405. This Court affirmed that judgment summarily. 399 U.S. 901 (1970). *See Sailors* v. *Board of Education*, 387 U.S.

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permit residents in areas subject to potential annexation to vote on the issue. R. Eickhoff & M. Meier, *McQuillin on the Law of Municipal Corporations* § 7.16 (3d ed. 1979).

105 (1967) (holding no right to vote for members of board of education). Thus, appellants' claim that there should be a constitutionally recognized right to vote in an annexation proceeding is clearly precluded by prior decisions of this Court.[4]

Appellants alternatively assert (J.S. 5) that the Court should equate the petitioning process in § 9-471 with voting and therefore hold that Arizona in effect requires voting in annexation proceedings. From this they argue that any restriction on this quasi-right to vote should be reviewed under standards employed in other voting rights cases. But, it is sheer boot-strapping in the annexation context to argue that, even if there is no right to vote, the Court still has authority to treat non-voting annexation procedures as though they involve voting and thereby require the state to demonstrate a "compelling state interest" for its procedure. Whether voting is provided for is solely a matter of state law.[5]

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[4] Lower federal and state courts have consistently rejected claims similar to appellants' that states are constitutionally obliged to permit voting as a condition of annexation. *See, e.g., Carlyn* v. *City of Akron*, 726 F.2d 287 (6th Cir. 1984); *Berry* v. *Bourne*, 588 F.2d 422 (4th Cir. 1978); *Township of Jefferson* v. *City of West Carrollton*, 517 F. Supp. 417 (S.D. Ohio 1981), *aff'd*, 718 F.2d 1099 (6th Cir. 1983); *Doenges* v. *City of Salt Lake City*, 614 P.2d 1237 (Utah 1980); *Torres* v. *Village of Capitan*, 92 N.M. 64, 582 P.2d 1277 (1978).

[5] The state court cases relied upon by appellants do not conflict with the decision below. In *Town of Fond Du Lac* v. *City of Fond Du Lac*, 22 Wis. 2d 533, 126 N.W.2d 201 (1964), the constitutionality of the Wisconsin annexation statute was not even in question. The Wisconsin statute provided that contiguous territory could be annexed by a city on receipt of a petition filed with the city signed by a majority of the *electors* residing within such territory, and the owners of one-half (½) of the land in the area within such territory. The question was whether the annexation was void because the city had used economic pressure in securing the signatures of electors on the petition, and because the council had deliberately prevented some of the electors from having an opportunity to sign

In Arizona, petitioning is plainly not voting; as the Arizona Supreme Court conclusively held below (J.S. App. A7), "A.R.S. § 9-471 does not . . . provide for an election on the issue of annexation." No decision of this Court, even outside of the annexation context, has ever expanded the right to vote to a situation where no election is held. All of the cases cited by appellants as involving "exclusion of non-property owning residents from participation in a political decision" (J.S. 4) were cases where an election was expressly provided for under state law. See *Hill* v. *Stone*, 421 U.S. 289 (1975); *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969); *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970). Thus, the holding of the Arizona Supreme Court properly respected the bright-line principle embodied in this Court's decisions that heightened scrutiny is warranted only if the state grants a voting right in an election and then attempts to restrict it.[6]

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the petitions. The Wisconsin Supreme Court held that the signatures of the electors who succumbed to economic pressure and signed the petitions were invalid, and thus that the annexation failed for want of signatures of the majority of electors.

Thus, nothing in that case indicates that the court would apply heightened scrutiny under the Equal Protection Clause to an annexation procedure which was initiated by a petition of property owners.

Similarly inapposite are the California decisions, which held that petitioning which could block an incorporation election that was expressly provided for by state law, constituted an interference with a voting right. *Curtis* v. *Board of Supervisors*, 7 Cal. 3d 942, 104 Cal. Rptr. 297, 501 P.2d 537 (1972); *Levinsohn* v. *City of San Rafael*, 40 Cal. App. 3d 656, 115 Cal. Rptr. 309 (1974). As the Arizona Supreme Court explained (J.S. App. A9), there is no election provided for in § 9-471, and therefore, no interference with voting rights. *See Weber* v. *City Council of Thousand Oaks*, 9 Cal. 3d 950, 109 Cal. Rptr. 553, 513 P.2d 601 (1973).

[6] The only instances where this Court has deviated from the basic rule are cases which appellants acknowledge (J.S. 6) provide no help to them. Even when an election is provided for under state law, the Court has held in some circumstances that restrictions on

2. Appellants argue (J.S. 7-8) that, even if § 9-471 is subject to minimal scrutiny under the Equal Protection Clause, Arizona's decision to favor property owners by permitting them to participate in the petitioning process is nevertheless an irrational classification in violation of that provision. This claim involves no substantial legal issue warranting plenary review; moreover, the holding of the Arizona Supreme Court that the classification is rational is clearly correct.

Appellants in effect concede (J.S. 7) that the distinction is rational because they acknowledge the obvious and unique interest of property owners in being subjected to the property taxing power of the annexing city or town. It is certainly rational for a legislature to conclude that this interest is so dominant that without the consent of most of those people whose property will be taxed no annexation should be permitted.

Appellants complain (J.S. 7) that the Arizona Supreme Court failed to explain why non-property owners should be excluded completely from the process. But, the court found expressly that including all electors in the process would severely "hinder" the annexation process and impair urban development. That same finding was made in *Adams* to justify the distinction in the Colorado statute and this Court affirmed. 308 F. Supp. at 1404, *aff'd*, 390 U.S. 9017. Thus, the Arizona Supreme Court properly held that § 9-471's exclusion of non-property owners is rational.

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voting are constitutionally permissible. *See, e.g., Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973); *Ball* v. *James*, 451 U.S. 355 (1981). Appellants argue that the holdings in those cases, when the right to vote was limited to property owners, should not extend to this case. But, the Court has no reason to consider that issue in this case because the basic factual predicate for the issue in those cases—the holding of an election—is missing here. Thus, there is no attempt to restrict who can *vote*. No one votes.

Finally, appellants assert (J.S. 7) that some property owners may have very little interest in the annexation decision and some non-property owners may have a significant stake in that process. But, this Court has long held that a classification subject to minimal scrutiny need not satisfy "mathematical nicety," *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). See *Dandridge* v. *Williams*, 397 U.S. at 486. It is sufficient that it is reasonable to assume that property owners as a whole have a greater stake than non-property owners in the outcome of an annexation proceeding.[7]

CONCLUSION

The appeal should be dismissed for want of a substantial federal question or the judgment of the Arizona Supreme Court should be affirmed.[8]

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[7] Appellants have cited no other state statute which is even similar to § 9-471, and indeed, it is unlikely that any such statute exists. *See* McQuillin, supra, § 7.16. Thus, the issue presented in this case has an extremely narrow compass, and does not warrant plenary review by this Court.

[8] Although the Arizona Supreme Court did not address the standing issue because the court held that standing is not a bar to bringing a lawsuit in state court, it is clear that appellants must establish Article III standing in order to invoke the jurisdiction of this Court. Appellants appear to have standing to argue that they have a constitutional right to vote in an election on the annexation issue. Arizona law clearly does not permit such a vote, and therefore, if such a right existed, which it does not, then appellants would have been denied that right. As discussed above, appellants' right to vote argument is clearly controlled by prior precedents of this Court.

Appellants would seem to lack standing to challenge the petitioning process as an election limited to non-property owners. To the extent the petition supporting annexation in this case could be characterized as an election, appellants clearly had a voice in it. They were property owners whose presumed refusal to sign the petition is the same as a vote against annexation. Thus, their rights were fully protected. Appellants' claim is therefore based

Respectfully submitted

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on injury to the rights of third persons, who may not even exist, which a litigant ordinarily has no standing to assert in a federal court. *See, e.g., Valley Forge College* v. *Americans United*, 454 U.S. 464, 472-474 (1982); *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 263 (1977); *Singleton* v. *Wulff*, 428 U.S. 106, 112-114 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 498-501, 511 (1975); *Tileston* v. *Ullman*, 318 U.S. 44, 46 (1943).

In any event, because appellants appear to have standing to present their right-to-vote claim, the appeal should be dismissed for want of a substantial federal question and not for want of jurisdiction.